U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

April 24, 2012

The Honorable William K. Suter
Clerk, The Supreme Court of the United States
Washington D.C. 20543

Re: *Jean Marc Nken* v. *Holder*, S. Ct. No. 08-681

Dear Mr. Suter:

This letter is submitted in order to clarify and correct a statement contained in the government's brief in *Nken* v. *Holder*, 556 U.S. 418 (2009), which was submitted to this Court on January 7, 2009.[1]

In *Nken*, this Court considered the standards for resolving an alien's request for a stay of removal pending judicial review of the removal order. The petitioner argued that, in deciding whether to grant a stay, courts should apply the traditional stay factors: whether an applicant is likely to succeed on the merits; whether the applicant will be irreparably harmed absent a stay; whether other interested parties would be injured by a stay; and "where the public interest lies." 556 U.S. at 425-426. The government contended that a court may not stay a removal "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2). See 556 U.S. at 426. In responding to an argument by amici curiae suggesting that the government's position would create a serious constitutional question under the Suspension Clause, the government's brief contended that an alien ordinarily need not remain in the United States to take advantage of a favorable judicial ruling because, *inter alia*:

[1] The government undertook a review of the accuracy of that statement following a district court decision in Freedom of Information Act (FOIA) litigation seeking the basis for the government's statement. See *National Immigration Project of the National Lawyers Guild* v. *United States Department of Homeland Security*, 2012 WL 375515 (S.D.N.Y. Feb. 7, 2012) (App. A, *infra*) (ordering disclosure under FOIA of portions of certain documents from the Office of the Solicitor General consisting of emails and attachments that were generated in preparation of the government's brief in *Nken* and for oral argument).

> By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.

08-681 Resp. Br. 44 (filed Jan. 7, 2009).

The government did not cite a source for that proposition. The government's representation was premised on interagency communications exchanged during the preparation of the government's brief concerning facilitation of return and restoration of pre-removal status for an alien who prevails on judicial review.[2] In substance, those communications contained the following information. To effectuate return, the government would generally grant parole and send a cable to the consulate or embassy nearest to the alien with instructions to issue a travel document to the alien. The issue was not addressed by statute, and the government had not established a procedure as such: the volume of such cases was not large, and they were handled on a case-by-case basis. Whether the government would parole the alien into the country could depend on the nature of the judicial relief, including whether the alien was entitled to resume lawful status based on the favorable judicial decision. It could also depend on whether the alien's presence was necessary for further administrative proceedings on remand (if it was not necessary, the alien would probably not be returned). The alien was responsible for providing his or her own transportation to the United States. The alien's status upon return would be based on the status he had at the time of removal. If the alien was in detention before removal, the alien could be returned to detention upon arrival.[3]

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[2] The information described in the text is reflected in interagency emails, which the district court in *National Immigration Project* has ordered the government to disclose in redacted form. App. A, *infra*. The government is not appealing from those orders. In order to place the court-ordered disclosures in context, the government is releasing the full text of the emails in unredacted form, redacting only limited information—including on a matter subject to the district court's approval—whose release might impair individual privacy interests. The government will lodge those documents with the Clerk of the Court upon request.

[3] The information was later distilled in a January 16, 2009, communication in preparation for oral argument, which the district court in *National Immigration Project* also ordered to be disclosed. In substance, that communication confirmed that if an alien had been lawfully residing in the United States, or the alien's presence was required for continued proceedings, the government would facilitate his return. The communication also described the government's approach.

The statement in the government's brief was intended to encapsulate the core aspects of this information. But without providing additional detail about the government's approach to effectuating return and restoring status, the statement that relief was accorded "[b]y policy and practice" suggested a more formal and structured process than existed at the time. The government should have provided a more complete and precise explanation.

In *Nken*, the Court rejected the government's legal position that the requirements for a stay pending judicial review were controlled by 8 U.S.C. 1252(f)(2) and held instead that the traditional requirements for a stay applied. 556 U.S. at 432-433. In analyzing those traditional requirements, the Court stated that removal alone would not cause an alien irreparable injury because "those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. See Brief for Respondent 44." *Nken*, 556 U.S. at 435.[4] Lower courts have relied on this aspect of *Nken* in evaluating requests to stay removal pending judicial review. See, *e.g.*, *Leiva-Perez* v. *Holder*, 640 F.3d 962, 969 (9th Cir. 2011); *Villajin* v. *Mukasey*, 2009 WL 1459210, at *4 (D. Ariz. May 26, 2009).

The Court was correct that removed aliens who prevail on judicial review "can be afforded effective relief" through return and restoration of status and that such relief would negate irreparable harm from removal alone. Since the time of the Court's decision, however, declarations filed by the plaintiffs in the district court in *National Immigration Project* (see note 1, *supra*), as well as other documents that the government has produced to the plaintiffs in response to their Freedom of Information Act request, have raised questions about the promptness and consistency with which return has actually been accomplished.[5] Those materials identify some aliens who were removed during the pendency of their judicial review and returned to the United States after they prevailed before the federal courts, but who encountered significant impediments in returning. Those difficulties stemmed in part from the absence of a written, standardized process for facilitating return; the resulting

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[4] The Court remanded the case to the Fourth Circuit. 556 U.S. at 436. On remand, the government agreed not to remove Nken pending the court of appeals' disposition of the petition for review, rendering moot "whether the 'traditional criteria' entitle Nken to a stay." *Nken* v. *Holder*, 585 F.3d 818, 821 (4th Cir. 2009).

[5] The declarations filed by the plaintiffs in *National Immigration Project* are available at http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf.

uncertainty in how to achieve that objective in field offices, U.S. embassies and consulates, and other agencies involved in the process; and the lack of clear or publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings.

In light of those materials, the government is not confident that the process for returning removed aliens, either at the time its brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied. The government therefore believes that it is appropriate both to correct its prior statement to this Court and to take steps going forward to ensure that aliens who prevail on judicial review are able to timely return to the United States.

On February 24, 2012, John Morton, Director of U.S. Immigration and Customs Enforcement (ICE), the agency primarily charged with effectuating aliens' removal from the United States, issued a directive affirming the agency's commitment to facilitate return and providing greater detail about the circumstances and process under which ICE will do so.[6] That directive explains in particular that, "[a]bsent extraordinary circumstances, if an alien who prevails before the U.S. Supreme Court or a U.S. court of appeals was removed while his or her PFR [petition for review] was pending, ICE will facilitate the alien's return to the United States if either the court's decision restores the alien to lawful permanent resident (LPR) status, or the alien's presence is necessary for continued administrative removal proceedings." It further states that "ICE will regard the returned alien as having reverted to the immigration status he or she held, if any, prior to the entry of the removal order and may detain the alien upon his or her return to the United States." ICE Directive 11061.1 ¶ 2.

To implement that directive, ICE has designated its Public Advocate as an initial point of contact for aliens seeking help in facilitating their return. The Public Advocate will direct the request to the appropriate ICE office and provide a further point of contact within ICE. ICE will coordinate with other components of the Department of Homeland Security to facilitate return, where it is appropriate. At the time of removal, ICE will also provide written notice to the alien concerning the process for facilitating return in the event of a favorable judicial ruling.[7] In addition, ICE has posted information on its website to advise

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[6] App. B, *infra*. The directive is also available at http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf.

[7] App. C, *infra*.

aliens, their representatives, and the general public about the process for return.[8] The State Department has advised its embassies and consulates around the world that if posts are contacted by an alien who prevailed on review and requests assistance in returning to the United States, the post should advise the alien to contact ICE's Public Advocate. Posts are also directed to process expeditiously cases in which ICE has determined that it will facilitate an alien's return to the United States.[9] Relevant government agencies may take additional steps to further improve these measures, if necessary or appropriate.

Since the middle of February 2012, while considering the issues discussed in this letter, the government has refrained from relying on the Court's statement in *Nken* in responding to applications to stay removal pending judicial review.[10] In stay litigation going forward, where the government contends that removal alone does not constitute irreparable harm, it will submit to the lower courts the procedures to facilitate return described above. In addition, in pending cases, it will submit letters on this issue pursuant to Fed. R. App. P. 28(j) where appropriate. Lower courts will therefore have the opportunity to address the adequacy of the government's procedures for facilitating return in evaluating requests for stays of removal.[11] The government will also notify the American Immigration Lawyers Association and immigration advocacy groups that, upon request with respect to a specific alien who was removed before prevailing in the courts, the government will investigate and

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[8] App. D, *infra*. The information is available at http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/faq.htm.

[9] App. E, *infra*.

[10] This Office is aware of one filing since that time in which the government, in responding to an application for stay of removal, relied on *Nken* in arguing that an alien would not suffer irreparable harm from the fact of removal alone. See Gov't Opp. to Petitioner's Emergency Mot. for a Stay of Removal at 10-11, *Lam* v. *Holder*, No. 11-2576 (7th Cir. filed Mar. 1, 2012). On March 8, 2012, the government withdrew its opposition to Lam's stay application.

[11] For example, in one recent case in which the government argued that an alien could not show irreparable harm because removal was not imminent, see Resp. Opp. to Petitioner's Mot. for a Stay of Removal on the Basis that It Is Premature, *Lee* v. *Holder*, No. 12-120 (2d. Cir. Feb. 10, 2012), the Second Circuit directed the government to address, by May 5, 2012, the "questions raised" in the district court's decision in *National Immigration Project*, *supra*, regarding "whether, under what procedure, and on what legal basis the government" accords aliens who were removed but prevail on judicial review "effective relief." See *Lee* v. *Holder*, No. 12-120 (2d. Cir. Apr. 5, 2012) (App. F, *infra*).

facilitate the alien's return if appropriate in light of the policy and procedures described above. The government does not believe that any action by this Court is required.

The government recognizes its special obligation to provide this Court with reliable and accurate information at all times. The government sought to carry out that obligation in good faith in this case, and we regret the necessity for this letter. Please circulate copies of this letter to the Members of the Court.

Sincerely,

Michael R. Dreeben
Deputy Solicitor General*

cc: Counsel of record

* The Solicitor General and the Principal Deputy Solicitor General are recused in this case.

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